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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID G. RUBIO,

Defendant and Appellant.

B208868

(Los Angeles County
Super. Ct. No. PA055209)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Barbara M. Scheper, Judge. Affirmed.

Alan Siraco, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant David Rubio was convicted, following a jury trial, of one count of attempted premeditated murder in violation of Penal Code sections 187 and 664 and one count of possession of a firearm by a felon in violation of section 12021, subdivision (a).¹ The jury found true the allegations that the offenses were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b), that appellant personally discharged a gun causing injury to another within the meaning of section 12022.53, subdivision (d), and that appellant had served a prior prison term within the meaning of section 667.5, subdivision (b). The trial court sentenced appellant to a total of 49 years to life in state prison.²

Appellant appeals from the judgment of conviction, contending that the trial court erroneously instructed the jury that a judge at the preliminary hearing determined that the prosecution's evidence was credible and declined to instruct the jury that a jury may consider whether a witness admitted being untruthful in assessing the witness's credibility. Appellant further contends that the trial court erred in limiting his cross-examination of the prosecution's gang expert. Appellant also contends there is insufficient evidence to support the jury's finding that the gang allegation was true. We affirm the judgment of conviction.

Facts

On May 4, 2006, a dispute broke out inside Harper's Bar between members of the South Side Reseda ("Reseda") and Canoga Park ("Canoga") gangs. According to bar patron and former gang member Erick Ibarra, a number of local gangs liked to hang out

¹ All further statutory references are to the Penal Code unless otherwise specified.

² Appellant's sentence consisted of a term of 15 years to life for the attempted murder plus 25 years to life for the section 12022.53 firearm enhancement and 3 years for the firearm possession conviction plus 3 years for the section 186.22 gang enhancement plus 3 years for the section 667.5 prior prison term enhancement.

at Harper's bar.³ Security personnel, including Victor Arevalo and Juan Vasquez, sent the people involved outside. There, a scuffle broke out.

Darryl Chebul, a bar manager at Harper's who was off-duty at the time, heard the disturbance and called 911.

The fight seemed to be settling down, but then a man chased another man across the parking lot, firing a gun at the fleeing man. Banafshem Mazloumi, a waitress working in the patio area of Harper's, testified that the shooter came from the group that was involved in the scuffle, went to a car and returned, firing a gun. Arevalo and Vasquez believed that the shooter did not come from the group ejected from the bar.

Bystanders tackled the shooter and began beating him. Appellant was the man who was tackled and beaten. Security guards stopped the violence. Police soon arrived and took custody of appellant.

The shooting victim was Behzad Boromand. He was taken to Northridge Hospital. There, he told Los Angeles Police Officer Mendoza that as he was leaving Harper's, he saw a fight in the parking lot. Someone pulled out a gun and started chasing him. Boromand fell and the shooter shot him on the ground. The shooter had a Canoga gang tattoo. Boromand was formerly a member of the Reseda gang. On August 2, 2006, Boromand gave Los Angeles Police Detective Jeffrey Waco a similar account of the shooting. At trial, Boromand claimed to remember nothing about the shooting and very little about his interviews with police or his preliminary hearing testimony.

Los Angeles Police Officer Scott Anderson arrested appellant at the scene of the shooting. Bullet casings found at the scene were consistent with being fired from a Taurus .25 caliber handgun which was seen falling out of appellant's pocket and on the ground underneath him when he was tackled.

At trial, Los Angeles Police Officer Joshua Lukaszewski testified as a gang expert about the Canoga gang. He identified appellant as a member of the Canoga gang and Reseda as a rival of Canoga. Officer Lukaszewski testified about the nature and criminal

³ Ibarra was not aware of which gangs were present that night.

activities of the Canoga gang, and explained how crimes like appellant's could benefit that gang.

Discussion

1. Preliminary hearing

During trial, the jury heard portions of the preliminary hearing testimony of the victim and two witnesses, Arevalo and Chebul. The prosecutor asked the trial court to take judicial notice of the date of the hearing. The court then made the following statement to the jury: "I think you heard mentioned throughout the trial of a preliminary hearing. That is a procedure that happens in all felony cases in which some evidence is presented but just enough for a judge to determine whether there is enough evidence to hold the defendant to answer, meaning to get us to this point of a trial. [¶] I will take judicial notice that it occurred on October 26, 2006 in this case."

Appellant contends that the trial court's statement was unnecessary and that the "inescapable inference" of the statement is that the prosecutor's case had some merit in the mind of the court and that there was therefore some probability that the appellant was guilty. We do not believe that the inference described by appellant is "inescapable" or even reasonable. More importantly, "the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Burgener* (1986) 41 Cal.3d 505, 538.) We assume that "jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148.)

Thus, the trial court's statement must be considered in light of all the instructions given at trial. Those instructions discuss many of the procedural steps taken before trial and the role of the judge and jury at trial and make it clear to the jury that whatever occurred before trial has no bearing on the determination to be made at trial.

In the statement at issue, the trial court discussed the preliminary hearing in the case, and told the jury that its purpose was to determine whether appellant should be

brought to trial. Although not directly mentioned by the court, the documents and testimony at trial showed that before the preliminary hearing was held in this case, appellant was investigated, arrested, and charged. The jury was specifically instructed that these preliminary steps are not to be understood in the manner suggested by appellant. CALCRIM No. 220 told the jury: "The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, *or brought to trial*. [¶] A defendant in a criminal case is presumed to be innocent." (Italics added.)

Other instructions explained the role of the judge and the jury at a trial, telling the jury: "You must decide what the facts are. It is up to all of you, and you alone to decide what happened, based only on the evidence that has been presented to you in this trial." The court also told the jury: "Do not assume just because I give you a particular instruction that I am suggesting anything about the facts." Thus, the instruction also told the jury that the reference to the preliminary hearing should not be understood in the manner suggested by appellant, that it was an assessment of the facts presented at that hearing.

On this appeal, appellant relies on a number of cases to support his claim. These cases involve different facts than those before us on appeal and so are not persuasive. (See, e.g., *People v. Oliver* (1975) 46 Cal.App.3d 747, 753 [new trial warranted where trial judge expressed disbelief of defense witness]; *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858 [judge not presiding at trial cannot testify about an earlier proceeding over which he presided]; *People v. Whitehead* (1957) 148 Cal.App.2d 701, 706 [prejudicial misconduct occurred when prosecutor argued to jury the fact that appellant had been held to answer after a preliminary hearing].)

2. CALCRIM No. 226

CALCRIM No. 226 instructs the jury on the factors that may be considered in determining a witness's credibility. Appellant contends that the trial court erred in intentionally omitting the following factor from CALCRIM No. 226: "Did the witness

admit to being untruthful?" He contends that this omission violated his right to due process and a fair trial. We see no error and no violation of appellant's rights.

Evidence Code section 780 lists 11 factors which may be considered by the trier of fact in determining the credibility of a witness. One of those factors is a witness's "admission of untruthfulness." (Evid. Code, § 780, subd. (k).)

A trial court has a sua sponte duty to instruct on each of the factors enumerated in Evidence Code section 780, unless the evidence makes any of them inapplicable. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883-884.)

As appellant acknowledges, no witness admitted to being untruthful. Thus, there was no need for the trial court to instruct on a witness's admission of untruthfulness.

Appellant points out that Boromand, Ibarra and Mazloumi gave inconsistent testimony.⁴ He contends that the inconsistent testimony suggested untruthfulness and the jury could have concluded that any of these witnesses "implicitly admitted" being untruthful.

CALCRIM No. 226 more than adequately instructed the jury on evaluating a witness whose statements were inconsistent, and deciding if those inconsistencies suggested falsehood. The instruction told the jury to consider the credibility factor, "Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?" The instruction then gave guidance in evaluating inconsistent statements, telling the jury: "Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently. [¶] If you do not believe a

⁴ Boromand and Ibarra both provided information to police shortly after the shooting. At trial, Boromand claimed not to remember the events surrounding the shooting. Ibarra claimed that his view was blocked, he was not wearing his glasses and he was intoxicated, and so his statements to police should be discounted. Mazloumi told police that the shooter ran back toward the bar before being tackled, but testified at trial that the shooter was tackled in the immediate area of the shooting.

witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject. [¶] If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things but told the truth about others, you may simply accept the part that you think is true and ignore the rest."

3. Cross-examination of gang expert

Appellant contends that the trial court erred in refusing to permit him to cross-examine Officer Lukaszewski to obtain the identity of Reseda's rival gangs other than Canoga. He contended that such evidence would show that the victim was shot by a member of a rival gang other than Canoga. We see no error.

Appellant was seeking to introduce evidence of third party culpability. Under California law, a defendant may offer evidence of third party culpability if that evidence is capable of raising a reasonable doubt of the defendant's guilt. (*People v. Hall* (1986) 41 Cal.3d 826, 833.) Evidence which shows only that a third party had a motive or opportunity to commit the crime, without more, does not raise a reasonable doubt about the defendant's guilt. (*Ibid.*) There must be direct or circumstantial evidence linking the third person to the actual commission of the crime. (*Ibid.*; accord, *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1136-1137; *People v. Lewis* (2001) 26 Cal.4th 334, 372.)

A trial court's determination of the admissibility of third party culpability evidence is reviewed under the abuse of discretion standard. (*People v. Guerra, supra*, 37 Cal.4th at p. 1113.)

Here, there was no direct or circumstantial evidence linking a member of another gang to the shooting. At most, appellant offered evidence that gangs other than Reseda

and Canoga were known to frequent Harper's.⁵ Appellant failed to establish that any specific gangs other than Reseda and Canoga were at the bar on the night of the shooting. No witnesses reported hearing any gang names other than Reseda and Canoga or seeing signs for other gangs that night. Thus, in the absence of evidence that a specific gang other than Canoga was present at Harper's bar at the time of the shooting, the relationship of that gang with Reseda had no relevance. Further, even if there had been evidence that another identifiable gang was present, the relationship between that gang and Reseda would still have no relevance. Presence at the crime would show opportunity, and a rivalry would show motive, but that is not enough to be admissible as evidence of third party guilt. There must be something to tie the third party gang member to the shooting. Even accepting appellant's premise that he was incorrectly identified as the shooter, there is nothing in the witness's descriptions of the shooter to suggest that he was a member of a gang other than Canoga, such as a tattoo from another gang, or the display of another's gang's colors or signs.

We likewise see no merit to appellant's federal constitutional claims. The United States Constitution permits third party culpability evidence to be excluded "where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial." (*Holmes v. South Carolina* (2006) 547 U.S. 319, 327.) As we discuss, *supra*, such a connection was lacking here. We see nothing in the excluded evidence which would have caused the jury to form a significantly different impression of the prosecutor's case. (See *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 [defendant's constitutional rights violated when excluded evidence would have had such a result].)

⁵ Erick Ibarra, a former gang member and a witness to the shooting, testified that a number of different gangs frequented Harper's, and identified those gangs as the Bryan Street, Reseda, Canoga, Pacoima, San Fernando, 18th Street, White Fence, Van Nuys, and Blythe Street gangs. He did not know if any gang members were at Harper's on the night of the shooting, however.

4. Gang enhancement

Appellant contends that there is insufficient evidence to support the jury's true finding that appellant committed the offense of being a felon in possession of a firearm for the benefit of a criminal street gang within the meaning of section 186.22. We see substantial evidence to support that finding.

In reviewing a challenge to the sufficiency of evidence, "the reviewing court must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432, fn. omitted.)

Here, Officer Lukaszewski testified that a gang member's possession of a gun "benefits the gang because it allows them protection from rival gang members, from police, from people trying to rob them for their drugs, money, so on and so forth."

There was also evidence supporting an inference that appellant in fact possessed the gun at Harper's with the intent to benefit the Canoga gang. There was a group of Canoga gang members at Harper's, and the testimony of Harper's waitress Mazlouni put appellant with that group. Ibarra testified that Harper's was a hang-out for a variety of gangs. Security guard Arevalo testified that there had been trouble in the bar before between the Canoga and Reseda gangs. He also testified that trouble often broke out on Thursday nights, when hip-hop music was played. May 4, 2006 was a Thursday. Thus, it is reasonable to infer that appellant brought the gun with him to Harper's to use in the event that a fight broke out between his gang and Reseda (or possibly some other gang). That would clearly benefit the gang.

Appellant contends that section 186.22 requires that the underlying conviction be committed with the intent to facilitate other criminal activity by gang members. Appellant relies primarily on *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099. We are not bound by and do not agree with the holding of that case. We agree with our colleagues in the Third District Court of Appeal and Division Four of this District Court of Appeal that

Garcia's interpretation of California law is incorrect. (*People v. Hill* (2006) 142 Cal.App.4th 770, 774; *People v. Romero* (2006) 140 Cal.App.4th 15, 19.) There is no requirement in section 186.22, subdivision (b), that the defendant's intent to assist criminal endeavors by gang members must relate to criminal activity apart from the offense being committed. To the contrary, the specific intent required by the statute is "to promote, further, or assist in *any* criminal conduct by gang members" (Pen. Code, § 186.22, subd. (b)(1), italics added.)

Further, assuming for the sake of argument that the holding of *Garcia v. Carey, supra*, were the law, there is ample evidence to support an inference that appellant had such an intent. A fight between Canoga and Reseda would almost certainly involve assaults by some Canoga gang members. Appellant's firearm possession would facilitate those criminal assaults by providing back-up.

Disposition

The judgment is affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.